

3M COMPANY,) AU:20-CV-00697-LY
)
Plaintiff,)
)
V.) AUSTIN, TEXAS
)
NEXUS MEDICAL LLC, VINASIA CHE TAO LLC,)
DOES 1-10,)
)
Defendant.) JULY 8, 2020

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL WILLIAM O'DONNELL
 AIMEE VIDAURRI
 NORTON ROSE FULBRIGHT US LLP
 111 W. HOUSTON STREET, SUITE 1800
 SAN ANTONIO, TEXAS 78205

 PAUL TRAHAN
 NORTON ROSE FULBRIGHT US LLP
 98 SAN JACINTO BOULEVARD, SUITE 1100
 AUSTIN, TEXAS 78701

FOR THE DEFENDANT: DAVID SCHILLER (COMPANY REPRESENTATIVE)

COURT REPORTER: ARLINDA RODRIGUEZ, CSR
 501 WEST 5TH STREET, SUITE 4152
 AUSTIN, TEXAS 78701
 (512) 391-8791

Proceedings recorded by computerized stenography, transcript
produced by computer.

10:03:45 1 (In chambers)

10:03:45 2 THE COURT: Good morning. Starting with who is on
10:04:02 3 the line for the plaintiff, please state your name, please.

10:04:07 4 MR. O'DONNELL: Good morning. Mike O'Donnell for the
10:04:09 5 plaintiff 3M.

10:04:11 6 THE COURT: Anyone else?

10:04:15 7 MR. TRAHAN: Paul Trahan, also for the plaintiff 3M.
10:04:18 8 Good morning.

10:04:22 9 THE COURT: Good morning.

10:04:23 10 MS. VIDAURRI: Good morning. Aimee Vidaurri, also
10:04:23 11 for the plaintiff.

10:04:24 12 THE COURT: All right. And for any of the
10:04:26 13 defendants?

10:04:30 14 MR. SCHILLER: Your Honor, David Schiller. I'm not
10:04:32 15 an attorney. I'm an officer with Nexus Medical, one of the
10:04:36 16 defendants. I'm participating -- I understood that I could
10:04:39 17 participate on the call.

10:04:40 18 THE COURT: Yes, you may participate on this call
10:04:43 19 because it's a preliminary thing, looking at the request for
10:04:49 20 temporary relief. But you will be required to obtain counsel
10:04:56 21 as quickly as you can because you can't represent the LLC by
10:05:02 22 officer. There's got to be a lawyer representing. But for
10:05:04 23 today, because it's on a request for emergency relief, you may
10:05:08 24 go ahead and appear.

10:05:10 25 We obviously are here this morning on the plaintiff's

10:05:14 1 request for immediate relief in *3M Company v. Nexus Medical*
10:05:22 2 *LLC*, and others. And I've gotten your announcements. We have
10:05:25 3 a court reporter present, and we are making a record.

10:05:28 4 So I have reviewed the filings from the plaintiff in
10:05:32 5 this case, the lengthy exhibits, and the application for
10:05:39 6 temporary restraining order, temporary injunction, and motion
10:05:43 7 for expedited discovery.

10:05:45 8 Let me start initially with one of the plaintiffs. I
10:05:50 9 do not want to hear advocacy at this point. Give me a very
10:05:55 10 brief *Reader's Digest* version of -- and I'm mainly interested
10:06:02 11 right now in the request for temporary -- I mean,
10:06:05 12 preliminary -- pardon me -- temporary restraining order. I'll
10:06:10 13 worry about your request for expedited discovery in a moment.

10:06:15 14 But just tell me in very few words what the facts are
10:06:20 15 that you think entitles you to temporary restraining order.

10:06:25 16 MR. O'DONNELL: Your Honor, this is Mike O'Donnell.

10:06:28 17 3M is looking to protect its brand from infringement
10:06:31 18 and dilution by tarnishment. And the primary exhibits for the
10:06:36 19 Court to focus on are all in the declaration of William Childs.
10:06:42 20 And the focus there is that we have received letters from a
10:06:48 21 prominent law firm representing Nexus Medical that claim that
10:06:52 22 3M has a contractual relationship with that company, which is
10:06:56 23 not true; that that company can please -- has placed and can
10:07:02 24 place orders for hundreds of millions of 3M N95 masks, which is
10:07:09 25 not true. It's not even possible. We have proven in the

10:07:12 1 record that the total U.S. production is 50 million masks per
10:07:20 2 month and is being handled by FEMA and being distributed
10:07:24 3 overwhelmingly to health care workers.

10:07:27 4 And also in the evidence attached to the Childs
10:07:29 5 declaration, the defendants claim they're working together;
10:07:32 6 that they have agreed to have access to our production, which
10:07:37 7 is not true; and that they are authorized sub-distributors of
10:07:42 8 3M. And so when we see these types of things in the
10:07:50 9 marketplace, where the orders are unfulfillable, the
10:07:52 10 contractual relationships do not excesses.

10:07:55 11 We have taken actions in many different cases to try
10:07:58 12 to protect our brand and to protect the public. And there's
10:08:03 13 also letters that show that there's an effort, or perhaps even
10:08:08 14 it's happened, that millions or hundreds of millions of
10:08:11 15 dollars, or even billions of dollars, have been placed into
10:08:15 16 escrows for capital purchase orders with 3M that cannot be
10:08:20 17 fulfilled.

10:08:21 18 So that's the gist of what we're trying to stop, and
10:08:25 19 sort of the urgency and the irreparable harm would be the
10:08:29 20 tarnishment of our brand in a pandemic where we're trying to do
10:08:34 21 the best we can to supply our health care workers. And we have
10:08:38 22 not increased our prices one penny, yet these defendants are
10:08:43 23 trying to offer our products for exorbitant prices: 200,
10:08:48 24 300 percent of the list price.

10:08:50 25 So that's it in a nutshell, Your Honor.

10:08:52 1 THE COURT: All right. Mr. Schiller, do you care to
10:08:54 2 respond to that?

10:08:56 3 MR. SCHILLER: Yes, sir, Your Honor. First and
10:08:59 4 foremost, Nexus Medical has never held itself out as a
10:09:05 5 sub-distributor of 3M, and counsel knows that. So to argue
10:09:10 6 that Nexus was holding themselves out as sub-distributors, he's
10:09:17 7 broad-brushing us with that.

10:09:18 8 Secondly, every letter that they have attached to
10:09:25 9 their complaint and petition for relief were letters that were
10:09:30 10 sent to people holding themselves out to be brokers or agents
10:09:35 11 of distributors.

10:09:37 12 Now, Nexus Medical, Your Honor -- and I've provided
10:09:41 13 proof of this last Friday to Mr. O'Donnell, and I'm
10:09:45 14 disappointed that he's ignored that proof, Your Honor, but
10:09:49 15 Nexus Medical had a contract and purchase order with Phoenix
10:09:59 16 Endoscopy Products LLC out of Florida. Their attorney Craig
10:10:03 17 Temple was representing them.

10:10:05 18 They provided to Nexus an e-mail from 3M's customer
10:10:12 19 service confirming that a 100-million unit order for 1860s has
10:10:21 20 been placed on April 30th of this year to Phoenix Endoscopy,
10:10:29 21 which matches the 100-million unit order that we had made with
10:10:35 22 Phoenix Endoscopy. We were provided a 3M distributor number.

10:10:40 23 The e-mail that was forward back to us by their
10:10:43 24 counsel, Your Honor -- and I provided this to Mr. O'Donnell --
10:10:48 25 has a hyperlink. If you click on that hyperlink, it takes you

10:10:53 1 to 3M's distributor portal where, if you have a password and
10:10:58 2 user name, you can track your 3M order.

10:11:02 3 So if we -- if anything has happened in this case,
10:11:06 4 Your Honor, it's we've been the victim of a fraud that someone
10:11:11 5 at 3M is now claiming is not a distributor for respirators. If
10:11:20 6 you read their pleading very carefully, Your Honor, they don't
10:11:23 7 say that Phoenix Endoscopy is not a 3M distributor. What they
10:11:29 8 say is Phoenix Endoscopy is not a distributor who can order
10:11:33 9 respirators. Well, that's not something that we would be able
10:11:37 10 to know and confirm.

10:11:39 11 Secondly, Your Honor, I provided proof to
10:11:41 12 Mr. O'Donnell on Friday of a signed agreement with Lovell
10:11:46 13 Government Services, LLC, who I did confirm through 3M's
10:11:51 14 hotline -- fraud hotline that they were in fact a 3M
10:11:55 15 distributor. And we had an agreement to place orders, up to
10:11:59 16 50 million units at a time, with them. And in the process of
10:12:07 17 reaching those agreements with Lovell Government Services, they
10:12:10 18 provided to me a letter from 3M Corporate confirming that they
10:12:14 19 were in fact a 3M distributor.

10:12:17 20 So, Your Honor, from our perspective, Nexus is a --
10:12:21 21 is a medical supply company. We're registered with the FDA.
10:12:26 22 We have clients that were trying to purchase 3M masks. We
10:12:33 23 fought through a chain of brokers that was fraught with fraud,
10:12:37 24 trying to find legitimate 3M distributors. We found two, and
10:12:42 25 we reached agreements with them and then began the process of

10:12:46 1 trying to work with prospective buyers that met the
10:12:52 2 requirements of 3M and the executive order by the White House
10:12:56 3 that you had to be a first responder, a hospital, or a
10:13:01 4 government agency to be able to buy 3M masks. And we were
10:13:06 5 working through the process of getting through that.

10:13:10 6 Now, ultimately, we've not received a single mask
10:13:14 7 from Phoenix Endoscopy. When I spoke with Phoenix Endoscopy's
10:13:18 8 counsel two days ago, he confirmed that, as far as they know,
10:13:23 9 the order is still pending and they've not received anything
10:13:26 10 from 3M canceling the order for the 100 million masks. But
10:13:31 11 they have not received a delivery date either.

10:13:35 12 Lovell Government Services informed me that they
10:13:40 13 ended up terminating their relationship with 3M. Now, all this
10:13:44 14 stuff is back into May, two months ago. Lovell Government
10:13:48 15 Services ultimately informed me they ended up terminating their
10:13:52 16 distributorship with 3M because 3M would never fulfill any of
10:13:57 17 the orders that were placed with them.

10:13:59 18 So I've got a problem with the broad-brush painting,
10:14:04 19 that we're out there committing some kind of fraud. We're
10:14:08 20 trying to legitimately work our way through --

10:14:11 21 THE COURT: Well, Mr. Schiller, that's fine. I'm not
10:14:15 22 going to get to any fraud allegations right now. That's not
10:14:18 23 affecting the Court, and it's not affecting the Court's
10:14:21 24 reasoning.

10:14:22 25 For purposes of this hearing this morning, if I grant

10:14:25 1 3M any relief, it will only be in effect for 14 days, at the
10:14:29 2 outside, and I will need to set a hearing to follow up on it.
10:14:34 3 The fraud comes later down the line, whether it exists or not.
10:14:40 4 What we're talking about this morning is whether I ought to
10:14:43 5 grant the particular restraint at this time pending a hearing
10:14:48 6 on a request for a preliminary injunction to keep that
10:14:53 7 restraint in effect over the life of this case. And it's over
10:14:56 8 the life of this case that we will get into the fraud
10:15:00 9 allegations. And by then you will have a lawyer, and I will
10:15:06 10 want to take up the lawyer's argument on that.

10:15:08 11 So let me -- let me ask you this question: Have you
10:15:14 12 had an opportunity to review the proposed order that 3M has
10:15:19 13 provided? It's called Proposed Order on 3M Company's
10:15:24 14 Application for Temporary Restraining Order, Preliminary
10:15:27 15 Injunction, and Motion For Expedited Recovery. Have you seen
10:15:31 16 that, or do you have it available to you?

10:15:34 17 MR. SCHILLER: Your Honor, I don't know if I have it
10:15:36 18 available to me.

10:15:40 19 THE COURT: All right. Well, let me tell you what is
10:15:41 20 being asked for today -- and we're just dealing with immediate
10:15:46 21 relief -- is that they request the Court to enjoin defendants,
10:15:51 22 which includes your company, their agents, servants, employees,
10:15:55 23 officers, and all persons and other entities -- and entities
10:15:59 24 having active concert and participation with them, during the
10:16:03 25 pendency of this action from using the 3M trademarks and any

10:16:08 1 other word name, symbol, device, or combination thereof that is
10:16:13 2 confusingly similar to 3M marks, for, on, and/or sale of any
10:16:25 3 goods or services, including, without limitation, Plaintiff's
10:16:27 4 3M-brand N95 respirators, and;

10:16:32 5 Defendants, their agents, servants, employees,
10:16:34 6 officers, and all persons and entities in active concert or
10:16:38 7 participation with it, are enjoined during the pendency of this
10:16:43 8 action from engaging in any false, misleading, and/or deceptive
10:16:48 9 conduct in connection with 3M and its products, including,
10:16:52 10 without limitation, representing itself -- that's the
10:16:56 11 independent defendant, each independent defendant -- as being
10:16:59 12 an authorized distributor, vendor, agent, representative,
10:17:03 13 retailer, and/or licensee of 3M and/or any of 3M's products,
10:17:09 14 including, without limitation, 3M-brand N95 respirators;
10:17:14 15 falsely representing to have an association or an affiliation,
10:17:18 16 sponsorship by, and/or in connection with, 3M and/or any of its
10:17:24 17 products; and falsely representing that 3M has increased the
10:17:28 18 prices of its 3M-brand N95 respirators.

10:17:35 19 I believe that I glean from what you have told me
10:17:38 20 this morning that you're not -- you're stating to me that
10:17:41 21 you're not doing any of that, that Nexus is not doing any of
10:17:45 22 that; is that correct?

10:17:47 23 MR. SCHILLER: That's correct, Your Honor, we're not.
10:17:49 24 The only concern I have, Your Honor, is the breadth of what you
10:17:55 25 just read to me could be interpreted that, if we have ongoing

10:18:03 1 efforts to purchase for customers worldwide 3M products from 3M
10:18:10 2 distributors, that we would have to stop that.

10:18:14 3 THE COURT: No. It might --

10:18:16 4 MR. SCHILLER: That's what I want to make sure of.

10:18:19 5 THE COURT: Well, it might be construed that way.

10:18:22 6 But I don't find that to be particularly as broad as you think
10:18:26 7 it does. I think if I render an order in that regard and you
10:18:36 8 look at it carefully, it's tailored tightly enough to give 3M
10:18:42 9 what it believes is the trademark protection that it needs for
10:18:45 10 right now.

10:18:46 11 Now, bear in mind, I'm not getting into any of the
10:18:49 12 fraud issues or anything of that nature right now. And because
10:18:55 13 a preliminary -- or temporary retraining order can only last at
10:19:00 14 the outside for 14 days, anything that I do in that regard
10:19:04 15 today, at the outside, would only last until July the 22nd.
10:19:13 16 And I certainly wouldn't even attempt to run it longer than
10:19:16 17 that, and it would be my anticipation if I grant that request
10:19:19 18 to hold a hearing. It will have to be done telephonically
10:19:24 19 again, or by Zoom, because we have our courthouse pretty much
10:19:29 20 shut down right now and we're not conducting in-person hearings
10:19:32 21 in July or August, for all that matters, and I don't know what
10:19:37 22 we're going to be doing in September.

10:19:46 23 MR. SCHILLER: Sure. I understand, Your Honor. As
10:19:47 24 long as the Court -- you know, I'm fine with you making clear
10:19:50 25 that we have other 3M distributors offering to sell us product

10:19:57 1 to source for our clients' needs, that that's not a violation
10:20:01 2 of your TRO, we have no problem.

10:20:07 3 We had an image of a 3M 1860 mask on our website. I
10:20:12 4 informed Mr. O'Donnell last Friday when I found out about their
10:20:16 5 concerns that I had our IT people remove that image. And that
10:20:21 6 is the only public facing item that would associate Nexus with
10:20:26 7 3M. And so we're fine with that understanding.

10:20:36 8 The only other concern I have, Your Honor, is, in the
10:20:39 9 pleadings filed in this case, 3M's counsel attaches as exhibits
10:20:48 10 TROs and preliminary injunctions from all these other cases
10:20:50 11 where they've been combating fraud. And I don't want a TRO
10:20:55 12 entered in this cases used in another case that would then
10:21:00 13 somehow smear our company's name because of what may be going
10:21:05 14 on in those other cases that we have nothing to do with it.

10:21:09 15 THE COURT: Well, once I do anything, it's public
10:21:13 16 record. And if you have a complaint about how that public
10:21:17 17 record is being used, you will need to take it up at that
10:21:21 18 particular time. This is premature on it. That's one of the
10:21:27 19 reasons why temporary restraining orders are only in effect for
10:21:34 20 a short period of time.

10:21:39 21 So here is what I'm going to do today: I'm going to
10:21:45 22 grant the temporary restraining order under the basic terms and
10:21:56 23 conditions as suggested by 3M, and I'm going to set a hearing
10:21:59 24 on the request for preliminary injunction by telephone for
10:22:05 25 July the 22nd, 2020 at 10 am.

10:22:10 1 And, Mr. Schiller, what you need to do is redouble
10:22:14 2 your efforts on getting counsel, and have counsel contact the
10:22:20 3 attorneys for 3M, primarily Mr. O'Donnell from the way this has
10:22:25 4 gone today, and see if you can work out the parameters for a
10:22:30 5 preliminary injunction so we don't have to have that hearing.

10:22:34 6 I can extend a temporary restraining order by its
10:22:39 7 terms for one 14-day period. So if you are in negotiations and
10:22:47 8 talks and you-all find, or either side finds, that July the
10:22:52 9 22nd is not convenient, I have some leeway to extend what I've
10:22:58 10 done for another 14 days.

10:23:00 11 My preference would be that, between now and
10:23:04 12 July 22nd, that you-all put your heads together and agree on a
10:23:10 13 stand-down, a form of preliminary injunction that would stay in
10:23:14 14 effect during this lawsuit, that you can live with. And I
10:23:21 15 expect you-all to demean yourselves in the best possible
10:23:25 16 manner, Mr. Schiller and lawyers, and if Nexus gets a lawyer or
10:23:32 17 if the other defendant appears, and try to work this out. If
10:23:40 18 you can't get it worked out, I have no problem with dealing
10:23:43 19 with the things as they come up.

10:23:46 20 Also, I'm not going to grant the request for
10:23:51 21 expedited discovery at this time because I'm setting this
10:23:53 22 hearing in two weeks and I don't find that there is going to be
10:23:58 23 a big reason to do a lot of things within that two-week period,
10:24:04 24 because I want you to discuss whether you can reach an
10:24:06 25 agreement on the production of those documents and expediting

10:24:15 1 discovery, if you can. I will tell you I am likely to accept
10:24:18 2 your agreement because I spend most of my time dealing with the
10:24:22 3 disagreements by lawyers, not agreements. So I urge you to
10:24:26 4 discuss what each side should have to produce before that
10:24:31 5 preliminary injunction hearing on July the 22nd.

10:24:35 6 And I'm going to order -- because I'm ordering the
10:24:44 7 defendants to show cause at that hearing on the 22nd why I
10:24:52 8 should not extend the temporary restraining order, I'm going to
10:24:56 9 order any response that you care to file will be on or before
10:25:00 10 July 20th. That will give me at least a day between to look it
10:25:05 11 over before we have this hearing.

10:25:12 12 Mr. Schiller, what I urge you to do, as I said, is
10:25:14 13 obtain counsel. That counsel should at once contact
10:25:18 14 Mr. O'Donnell or any of the other lawyers for 3M. If you're
10:25:24 15 having trouble with counsel, you try to work out something with
10:25:29 16 them, but you cannot represent your client at the hearing on
10:25:34 17 the 22nd.

10:25:36 18 MR. SCHILLER: I understand, Your Honor. I will have
10:25:40 19 counsel.

10:25:41 20 THE COURT: All right. If you don't, then I will
10:25:45 21 extend -- I will tell you I will extend the temporary
10:25:48 22 restraining order on my own to give you another two weeks to
10:25:52 23 get counsel. So that's the way we're going to proceed today.

10:25:57 24 Mr. Schiller, you understand that?

10:25:59 25 MR. SCHILLER: Yes, sir, Your Honor, I do. I

10:26:04 1 understand. I am meeting with counsel down in Austin later
10:26:08 2 this afternoon. We cleared conflicts with them late yesterday
10:26:12 3 but have to work out our retainer agreement with them. And
10:26:17 4 that's why I'm meeting with them. So we will have counsel in
10:26:20 5 advance of your -- of the hearing set for the 22nd. And I will
10:26:25 6 pass on the deadline for our response to them, and they will
10:26:30 7 reach out to Mr. O'Donnell and comply with your instructions.

10:26:35 8 THE COURT: All right. Mr. O'Donnell, Mr. Trahan,
10:26:38 9 Ms. Vidaurri, you-all understand that, too, correct?

10:26:42 10 MR. O'DONNELL: Yes, Your Honor.

10:26:43 11 MR. TRAHAN: Yes, Your Honor.

10:26:43 12 THE COURT: All right. Well, we will get an order to
10:26:45 13 that effect out. At this point is there anything else that we
10:26:52 14 need to take up this morning while I've got you on the phone?

10:26:59 15 MR. O'DONNELL: No, Your Honor.

10:27:01 16 THE COURT: Mr. Schiller, anything further?

10:27:04 17 MR. SCHILLER: No, Your Honor. I'm sure that our
10:27:10 18 lawyers and Mr. O'Donnell will be able to work out informal
10:27:14 19 agreements on the exchange of the information and documents for
10:27:17 20 the preliminary injunction hearing.

10:27:19 21 THE COURT: All right. Thank you so much. You-all
10:27:21 22 have a good day. And if you don't get something worked out for
10:27:25 23 the short run, I look forward to talking with you again in two
10:27:28 24 weeks.

10:27:29 25 (End of transcript)

1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 13th day of July 2020.

11

12 /S/ Arlinda Rodriguez
13 Arlinda Rodriguez, Texas CSR 7753
14 Expiration Date: 10/31/2021
15 Official Court Reporter
16 United States District Court
17 Austin Division
18 501 West 5th Street, Suite 4152
19 Austin, Texas 78701
20 (512) 391-8791

21

22

23

24

25